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NO. 99-437

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH LEHMAN, SECRETARY, WASHINGTON STATE DEPARTMENT OF CORRECTIONS

Petitioner,

v.

DONALD MACFARLANE and JAMES FOGLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NITH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioner submits this supplemental brief in accordance with the Court's request for advice concerning Respondents' current custody status and whether this case is now moot or may become moot in the future.

RESPONDENTS' CUSTODY STATUS

A. Respondent MacFarlane

On June 24, 1991, in Clark County, Washington, Respondent Donald D. MacFarlane was sentenced for a conviction of one count of Violation of the Uniform Controlled Substance Act (VUCSA) and one count of Third Degree Assault. Pursuant to a plea agreement, Mr. MacFarlane received an exceptional sentence of 72 months' confinement on the VUCSA conviction and eight months' confinement on the assault conviction, the terms to run concurrently. In addition to the prison sentence, Mr. MacFarlane was sentenced to a one-year term of community placement.[1]

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[1] "Community placement" under Washington law is "that period during which the offender is subject to the conditions of community custody and/or post-release supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two." Wash. Rev. Code § 9.94A.030(5).

"Community custody" is defined as "that portion of an inmate's sentence of confinement in lieu of earned early release time or imposed pursuant to RCW 9.94A.120(6)(8) or (10) served in the community subject to controls placed on the inmate's movement and activities by the department of corrections." Wash. Rev. Code § 9.94A.030(4).

Mr. MacFarlane completed his prison term on March 10, 1995, for the Clark County conviction and, pursuant to the award of good time, was transferred to a consecutive Pierce County conviction for one count of Violation of the Uniform Controlled Substances Act (VUCSA) and one count of bail jumping.[2] He was sentenced to 50 months' confinement on the VUCSA count and 24 months and one day confinement on the bail jumping count. In addition, Mr. MacFarlane was sentenced to a one-year term of community placement.[3]

Mr. MacFarlane completed his prison terms and was released to the State of Oregon on an interstate transfer for his community placement sentence on January 22, 1998. No later than February 1, 1999, his sentence expired and he is no longer in the custody of the Washington Department of Corrections.

B. Respondent Fogle

On March 26, 1992, in Pierce County, Washington, Respondent James Fogle pleaded guilty to one count of VUCSA. Pursuant to a plea agreement, he was sentenced to 60 months' confinement. Because Mr. Fogle committed his 1992 drug crime while on parole from an indeterminate sentence for an earlier, unrelated robbery conviction, the 1992 Pierce County sentence ran concurrently with a 36-month new minimum parole term imposed by the Indeterminate Sentence Review Board. In addition to the confinement term, Mr. Fogle was sentenced to a one-year term of community placement.

On May 26, 1995, Mr. Fogle, pursuant to the award of good time credits, became eligible for transfer to community

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[2] "Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason." Wash. Rev. Code § 9.94A.170(3).

[3] The community placement terms on both the Clark County conviction and the Pierce County conviction were served concurrently.

placement and on June 1, 1995, was released on parole and to begin serving his community placement term. Mr. Fogle completed approximately two months of his community placement term when he was arrested and convicted for one count of Burglary in the Second Degree in Lewis County, Washington. He received a sentence of 68 months' confinement for the new Lewis County offense and was re-admitted to the Washington Department of Corrections on September 1, 1995. As a result, the remainder of his community placement term for his Pierce County conviction tolled while he was in confinement on the unrelated 1995 conviction.[4]

On or about June 10, 1999, Mr. Fogle was released to his community placement term for the Pierce County conviction. Mr. Fogle's community placement term for his 1992 Pierce County conviction will expire on May 1, 2000.

STATEMENT OF MOOTNESS

Under Article III, § 2 of the Constitution, federal courts have no authority to decide the merits of a moot question. Throughout all stages of federal litigation, trial and appellate, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). In federal habeas corpus cases under 28 U.S.C. § 2254, the petitioner's constitutional challenge to his *conviction* is not rendered moot simply by his release from custody. *Sibron v. New York*, 392 U.S. 40, 51 (1968). This is because a criminal conviction has many collateral legal consequences that may persist despite the petitioner's release from custody. *Id.* at 55-57; *see also Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

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[4] If Mr. Fogle had not committed his Lewis County offense in 1995, his community placement term for the 1992 Pierce County conviction would have been completed in 1996.

If, however, the petitioner challenges only the *sentence* imposed, rather than the underlying conviction, the expiration of the petitioner's sentence during the course of the litigation will render his case moot. "Nullification of a conviction may have important benefits for a defendant . . . but urging in a habeas corpus proceeding the correction of a sentence already served is another matter." *North Carolina v. Rice*, 404 U.S. 244, 248 (1971). In such examples, the petitioner has obtained all the relief that he sought (*i.e.*, release from custody), and no live case or controversy remains. *Lane v. Williams*, 455 U.S. 624, 633 (1982).

Respondent MacFarlane's habeas corpus challenge to the length of his sentence is clearly moot. He has never challenged his underlying 1992 Clark County conviction but rather the amount of good time credits he received for his pretrial detention for that offense. He completed serving his sentence in February of 1999. Respondent MacFarlane has obtained, through the mere passage of time, all the relief that he originally sought in his petition. *Lane*, *supra*. His habeas petition is therefore moot.

Respondent Fogle's status is somewhat different from Mr. MacFarlane's because his sentence is not due to expire until May 1, 2000, after which date his case will be moot. His habeas petition, like Mr. MacFarlane's, constituted a challenge to the award of good time credits for pretrial detention and did not attack the underlying 1992 Pierce County conviction. But for his 1995 Lewis County conviction, his community placement term for the 1992 conviction would have continued uninterrupted and his sentence would have expired in 1996. It is at least conceivable that, if the Ninth Circuit's decision stands and the district court issues the writ on remand, Mr. Fogle may receive some benefit from the Ninth Circuit's decision (*i.e.*, a release from community placement on a date earlier than May 1, 2000).

Respondents' habeas petitions are either presently moot (Respondent MacFarlane) or will become moot in the very near

future (Respondent Fogle). The proper action for this Court to take (at least, with respect to Respondent MacFarlane's habeas corpus petition) would be to vacate the judgment of the Court of Appeals for the Ninth Circuit with directions that it instruct the district court to dismiss as moot the habeas corpus petition, or both petitions, if appropriate. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-23 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See also McCarthy v. Blair*, 498 U.S. 954 (1990) (applying *Munsingwear* rule to habeas corpus case). The remedy of vacatur "clears the path for future litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Munsingwear*, 340 U.S. at 40. In the present case, vacating the Ninth Circuit's decision would clear the path to future litigation, in the context of an actual case or controversy, of the legal claim presented by Respondents' habeas petitions and the proper application of 28 U.S.C. § 2254(d).

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CONCLUSION

Petitioner respectfully requests that this Court vacate the decision of the Ninth Circuit and order the dismissal of Respondent MacFarlane's habeas corpus case as moot. The petition for a writ of certiorari should be granted with respect to Respondent Fogle. In the event this Court does not take action on Petitioner's petition before May 1, 2000, however, Respondent Fogle's case should also be dismissed as moot.

RESPECTFULLY SUBMITTED

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